

## APPEAL NO. 010822

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 27, 2001. The hearing officer determined that: (1) the compensable injury sustained by the appellant (claimant) did not extend to or include an injury to the lower back; and (2) the claimant had disability resulting from the injury sustained on \_\_\_\_\_, beginning November 20, 2000, and continuing through November 27, 2000. The claimant appealed the hearing officer's determinations on sufficiency grounds. The respondent (carrier) urges affirmance.

### DECISION

We affirm.

#### Extent of Injury

The hearing officer did not err in determining that the claimant's compensable injury did not extend to or include his lower back. The claimant asserted that he injured his lower back on \_\_\_\_\_, simultaneously with his other injuries to his right leg and foot. The claimant had the burden to prove that he sustained damage or harm to the physical structure of the body, which arose out of and in the course and scope of his employment. Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. There was conflicting evidence presented at the CCH regarding this issue. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The Appeals Panel, an appellate-reviewing tribunal, will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The claimant attached to his appeal medical records relating to a recent MRI, which were not exhibits at the hearing. Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). The evidence, an MRI report showing disc abnormalities at L4-5 and L5-S1, as well as a medical report attributing these abnormalities to the incident of \_\_\_\_\_, was not in

existence at the time of the CCH. Nonetheless, the claimant testified at the hearing that he had contacted the carrier's doctor to arrange the MRI, which apparently is the one attached to the claimant's appeal. Our review of the record in this case discloses that the claimant made no request for continuance pending the MRI results. Thus, were we even to conclude that this is new evidence which would probably produce a different result, we cannot conclude that the claimant used diligence in attempting to bring the evidence to the attention of the hearing officer. Texas Workers' Compensation Commission Appeal No. 980299, decided April 2, 1998. Accordingly, we decline to consider the evidence attached to the claimant's appeal with regard to extent of injury.

#### Disability

The hearing officer did not err in determining that the claimant had disability from November 20, 2000, through November 27, 2000, resulting from compensable injuries to the claimant's right leg and foot sustained on \_\_\_\_\_. Disability is a question of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 000303, decided March 29, 2000. There was conflicting evidence presented at the hearing with regard to this issue. As with the extent-of-injury issue, the claimant attached to his appeal records relating to disability, which were not exhibits at the hearing. We conclude that said attachments do not meet the requirements of newly discovered evidence necessary to warrant a remand, insofar as the documents are cumulative of the testimony presented at the CCH. The hearing officer's determination with regard to disability is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

We affirm the decision and order of the hearing officer.

---

Michael B. McShane  
Appeals Judge

CONCUR:

---

Gary L. Kilgore  
Appeals Judge

---

Judy L. S. Barnes  
Appeals Judge